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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Guidelines for Evaluating the Effects of Radiofrequency Radiation	)	ET Docket No. 93-62

PETITION FOR PARTIAL RECONSIDERATION

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September 6, 1996

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SUMMARY

The American Radio Relay League, Incorporated (the League), the national association of amateur radio operators in the United States, requests that the Commission reconsider and reverse certain portions of the *Report and Order*, FCC 96-326, (61 Fed. Reg. 41006) released August 1, 1996 (the Report and Order). The Report and Order amended various Commission rules to adopt new guidelines and methods for evaluating the environmental effects of radiofrequency (RF) radiation from FCC-regulated transmitters. It adopted Maximum Permissible Exposure (MPE) limits for electric and magnetic field strength and power density for transmitters operating at frequencies between 300 kHz and 100 GHz, and limits for localized (partial body) absorption that will apply to certain portable transmitting devices.

It is the League's contention that the rules adopted in the Report and Order were adopted through flawed procedures, and in certain respects are, in substance, arbitrary and capricious. Further, the Commission unreasonably and arbitrarily refused to preempt certain state and local RF exposure regulation of amateur stations, and failed to consider the impact of its new rules on certain small business entities, including the League.

The League noted, in comments filed more than two years ago, the procedural flaws in the Notice in this proceeding, including the fact that the Notice did not propose any rules, or rules changes, at all. These procedural improprieties were not even addressed in the Report and Order. Instead, the Report and Order created rules not previously proposed that imposed arbitrary, substantive obligations on radio amateurs. The 50-watt TPO threshold requirement for conducting environmental evaluations by Amateur Radio licensees is both arbitrarily established and artificially low; it creates concerns on the part of State and local land use and other regulatory authorities; and it differentiates between amateur stations and other Commission licensees which are treated far less restrictively.

Neither did the Commission adequately address the propriety of preemption of State and local RF exposure regulations (or land use decisions based on RF exposure concerns) which arbitrarily restrict the ability of Commission licensed communications facilities to provide service.

In these respects, the Commission's Report and Order should be reconsidered and modified as set forth herein.

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

The American Radio Relay League, Incorporated (the League), the national association of amateur radio operators in the United States, by counsel and pursuant to Section 1.429 of the Commission's Rules (47 C.F.R. §1.429), hereby respectfully requests that the Commission reconsider and reverse certain portions of the *Report and Order*, FCC 96-326, (61 Fed. Reg. 41006) released August 1, 1996 (the *Report and Order*).[1] The *Report and Order* amended various Commission rules to adopt new guidelines and methods for evaluating the environmental effects of radiofrequency (RF) radiation from FCC-regulated transmitters. It adopted Maximum Permissible Exposure (MPE) limits for electric and magnetic field strength and power density for transmitters operating at frequencies between 300 kHz and 100 GHz, and limits for localized (partial body) absorption that will apply to certain portable transmitting devices. It is the League's contention that the rules adopted in the *Report and Order* were adopted through flawed procedures, and in certain respects are, in substance, arbitrary and capricious. Further, the Commission unreasonably and arbitrarily refused to preempt certain state and local RF exposure

[1] This *Report and Order* was published in the Federal Register on August 7, 1996. Therefore, pursuant to Section 1.429(d) of the Rules, this Petition for Reconsideration is timely filed.

regulation of amateur stations, and failed to consider the impact of its new rules on certain small business entities, including the League. In these respects, the Commission's *Report and Order* should be reconsidered and modified as set forth herein.

I. Introduction and Background

1. The League timely filed comments and reply comments in response to the *Notice of Proposed Rule Making* (the Notice), FCC 93-142, 58 Fed Reg. 19393, 8 FCC Rcd. 2849, released April 8, 1993. In its comments, the League noted that the Notice proposal was extremely difficult for the communications industry and licensees (and for amateur radio operators specifically) to address, for several reasons: The Notice (A) proposed no rule changes at all, nor anything on which to base a substantive comment; (B) asked for comment, not on the RF exposure guidelines themselves, but on the implementation of them, without substantive analysis anywhere in the Notice; (C) suggested that the Commission had not decided to adopt the 1992 ANSI standard, but offered no other standard as an alternative; (D) proposed a standard for RF exposure, the details of which were not readily available to the general public for review; and (E) addressed a subject that was, according to the Commission[2], beyond the Commission's expertise to adjudicate substantively anyway. These procedural difficulties were not addressed in the Report and Order whatsoever. The League had requested[3] that the Commission either withdraw the Notice and recast the proceeding as a Notice of Inquiry, or terminate the proceeding without action and refer the matter to the Environmental Protection Agency.

2. Though none of the League's concerns regarding the procedural improprieties of the Notice were addressed in the *Report and Order*, the latter adopted specific rules and modified

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[2] This was stated at Paragraph 8 of the Notice in this proceeding.

[3] See ARRL Comments at 2, 3.

certain existing rules. These rule changes were not earlier proposed or even hinted at in the Notice, and yet they significantly affect the substantive obligations of licensed radio amateurs, and potentially restrict numerous present and future amateur installations. Neither the League, nor radio amateurs generally, had any opportunity to comment on, or suggest alternatives to, the rules adopted by the Commission. The proceeding was initiated more than three years ago, and yet there was no advance notice whatsoever about the rules to be adopted. The rules adopted placed serious burdens and costs on the volunteer entities that prepare and administer amateur radio examinations. These burdens could have been avoided, or at least addressed, had the Commission given adequate notice of its intentions in this proceeding, in a corrected or further notice of proposed rule making.

3. Furthermore, notwithstanding the adoption in the *Report and Order* of a comprehensive regulatory scheme for limiting and evaluating RF exposure in controlled and uncontrolled environments from amateur stations, the Commission refused to preempt even arbitrarily established, more restrictive State and local regulation of those same facilities. Yet, the Commission did preempt state or local government regulation of "personal wireless service facilities" based on environmental effects of RF emissions pursuant to the Telecommunications Act of 1996, Section 704. There is no possible justification for preempting state and local RF exposure regulations (in favor of Commission regulation) for one radio service and not for others similarly situated.

4. The Commission established a blanket threshold level of amateur station transmitter output power (50 watts TPO), beyond which amateur licensees must conduct an environmental self-evaluation of compliance with MPE levels. This threshold is not frequency dependent. It appears to have no scientific basis at all. This limitation too was first announced by the

Commission in the *Report and Order*, and the public had no opportunity to comment on its appropriateness, or to suggest alternatives that might be less burdensome. Because of the Commission's arbitrary refusal to preempt non-Federal regulation of RF exposure, other than with respect to a small category of radio services, amateur licensees are in the untenable position of having to conduct Federal environmental assessments to determine compliance, and potentially limit their communications ability or station configuration, only to be subjected thereafter to arbitrary denials of land use or other State or local authorizations based on the fact that the station exceeds whatever locally-established limitations may exist.

5. The rules, as published in the *Report and Order*, contain substantive obligations with respect to Amateur Radio licensees, relative to the station evaluations to be conducted by essentially all licensees, and the means by which examinations are to be prepared and administered in the Amateur Service. The rules governing amateur radio examinations were made effective immediately[4], though there was no way for radio amateur volunteer groups to immediately make the necessary examination changes to comply with the new regulations. Neither has there been issued a revised OET Bulletin 65, or a separate bulletin, to assist Amateur Radio licensees in determining MPE compliance, or any indication of what those documents, if and when released, might contain by way of substantive obligations of the licensee.[5] Overall, there was no preparation for the issuance of this *Report and Order*, and the

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[4] The *Report and Order* was released August 1, 1996, and according to paragraph 170 thereof, was effective upon publication in the Federal Register, which took place August 7, 1996. This was due to the statutory obligation of the Commission to have final rules adopted and effective not later than August 6, 1996 pursuant to Section 704(b) of the Telecommunications Act of 1996.

[5] It is acknowledged that the Commission established a "transition period" for compliance by amateurs with the new rules, but this does not address the present lack of any ability of amateurs to determine the scope of their obligations under the new rules, given the unavailability

substantive rules, some of which appear arbitrary on their face, and some which were made effective immediately, were not possible of compliance as of the effective date.

II. There Was Inadequate Notice of the Rules Adopted

6. The Commission did not propose any specific rules in the Notice in this proceeding, as discussed above. It proposed only to adopt the 1992 ANSI/IEEE C95.1-1992 standard for RF exposure as a processing guideline for environmental evaluations made pursuant to Section 1.1307 of the Commission's Rules. The Notice indicated a willingness to adopt another standard which might be determined to be more suitable than the 1992 ANSI/IEEE standard. The Notice did not propose to substantively limit licensed radio facilities, nor did it propose the creation of any rules which would change amateur radio examinations or invalidate examination materials. Yet, what was ultimately adopted was a rule which required that, after January 1, 1997, all amateur stations operating at more than 50 watts TPO must conduct an environmental evaluation. This evaluation may determine that the station is operating in a configuration which exceeds the MPE limitations. If that is so, the station must be reconfigured or modified so that compliance is achieved. The means for making this substantive determination is not presently available, and the burden on amateur licensees is not, even now, known. The ability of amateur stations to be reconfigured is highly problematic, in view of the limiting factors of the new RF exposure guidelines, coupled with those limitations imposed by state and local land use and RF exposure regulations. Thus, the application of the new rules may constitute a *de facto* revocation or modification of the station license.

7. The Commission cannot impose substantive rule changes without adequate notice. The Commission had previously categorically exempted amateur stations from routine environmental

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of a revised Bulletin 65 or a substitute therefor.

processing. *Second Report and Order*, Docket 79-144, 2 FCC Rcd. 2064 (1987); ***modified by erratum***, 2 FCC Rcd. 2526 (1987). There was no indication in the Notice that the Commission intended either to substantively change amateur examination rules; the threshold for determining when an amateur station must conduct an environmental examination; or the circumstances under which its facilities must be modified. The Notice did not propose any rules changes, or even enunciate which standard for environmental exposure was proposed.

8. The Commission has interpreted the formal notice and comment obligations of the Administrative Procedure Act as follows:

> The Administrative Procedure Act requires an agency to give advance warning of proposed informal rulemaking by publishing a notice containing "either the terms [or] substance of the proposed rule or a description of the subjects and issues involved." 5 USC §553(b)(3). The Act, however, "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule." *California Citizens Band Association v. United States*, 375 F.2d 43, 48 [9 RR.2d 2037] (9th Cir. 1967); *Spartan Radiocasting Co. V. FCC*, 619 F.2d 314 [47 RR.2d 275] (1980).

Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 (Indecent Programming and Other Types of Materials on Cable Access Channels), 8 FCC.Rcd 998, 71 RR.2d 1177 (1993). While it is true that the agency is not required to adopt *vel non* the verbatim language in a published Notice of Proposed Rulemaking, it must have sufficiently identified the issues involved in advance so as to allow for informed comment:

> The APA require[s] the Commission to provide notice of a proposed rulemaking "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process." *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (DC Cir. 1988); *see also* SENATE JUDICIARY COMMITTEE, ADMINISTRATIVE PROCEDURE ACT, S. REP. NO. 752, 77th Cong. 1st. Sess. 14 (1945) ("Agency notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto"). This

> requirement serves both (1) "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies"; and (2) to assure that the "agency will have before it the facts and information relevant to a particular administrative problem." *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (DC Cir. 1982).

MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 78 RR.2d 742, 745 (DC Cir. 1995).

9. It is clear that, although the specifics of the rule actually adopted need not have been submitted for public comment, the scope and substance of the rules must appear from the public notice:

> Section 553 of the Administrative Procedure Act ("APA"), 5 USC §551 *et seq.* (1988), requires an agency to provide published notice of its proposed rulemaking. Such notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 USC §553(b)(3) (1988). In applying this provision, we have held that the notice requirement is satisfied so long as the content of the agency's final rule is a "logical outgrowth" of its rulemaking proposal. *See United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (DC Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). The focus of the "logical outgrowth" test, we have added, "is whether ... [the party], *ex ante*, should have anticipated that such a requirement might be imposed." *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 549 (DC Cir. 1983).

Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 68 RR.2d 1387, 1400 (DC Cir. 1991) (subsequent history omitted).

10. Thus, the United States Court of Appeals found the Commission's notice inadequate where, after notice and comment, it adopted a rule which substantially changed a longstanding policy of allowing channel substitutions without having fully divulged in advance the extent to which it intended to change its former rules:

> The Notice initiating the omnibus rulemaking, however, gave no indication that the FCC was planning to abandon this policy in the

> context of that proceeding. Although the Notice did indicate that the agency would not consider counterproposals that did not meet certain public interest criteria, it made no mention of the substitution policy, and did not alert the petitioners to the fact that the FCC was adopting procedures that would permanently foreclose their upgrade plans. The FCC's announced goal in the original Notice ... was not, on its face, mutually exclusive with the petitioners' desire to upgrade, and the petitioners thus had no indication that the FCC was changing its policy until the Commission expressly did so in the *First Reconsideration Order.*

Reeder v. FCC, 865 F.2d 1298, 65 RR.2d 1706, 1709-1710 (DC Cir. 1989). In fact, not only did the court find the notice inadequate, but it ruled that the faulty notice infected the comment process because it failed to apprise commenters of the scope of the Commission's intended reach:

> Although the original announcement of the counterproposal rules came in a Notice of Proposed Rulemaking, that Notice sought comment only on the proposed *allotments*, not on the rules governing the submission of counterproposals. Even if the implications of these rules had been clear, the rules were announced in the Notice as a *fait accompli*, without any indication that the FCC was soliciting comments from interested parties.

Reeder v. FCC, 865 F.2d 1298, 65 RR.2d 1706, 1710 (DC Cir. 1989).

11. Furthermore, even though some commenters may have addressed specific topics appearing in the final rule, those remarks cannot alone constitute actual or constructive notice to the remaining parties of the extent of the agency's issues for consideration. First, comments of other private entities cannot define or enlarge the scope of issues placed under discussion by a public agency. Second, responding parties cannot be expected to study submissions of all other parties for issues of immediate concern which were not introduced into the proceeding by the agency. As the Court of Appeals said:

> We have repeatedly held ... that each interested party is not required to monitor the comments filed by all others in order to

> get notice of the agency's proposal; hence, the comments received do not cure the inadequacy of the notice given. *American Fed'n of Labor v. Donovan*, 757 F.2d 330, 340 (DC Cir. 1985); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 550 (1983).

MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 78 RR.2d 742, 746 (DC Cir. 1995). In that case, even though some commenters had discussed topics addressed by the final Commission rule which were not covered in its Notice of Proposed Rulemaking, the court held that others were not put on notice as to the importance of that topic which was unidentified in the proceeding. Furthermore, even though some parties had actual knowledge of the FCC's intent to rule on the topic, gained through *ex parte* communications with FCC staff, the lack of general notice was held to violate the APA. *Id.* Said the court, "This is decidedly not how the notice and comment requirement of the APA is supposed to work." *Id.*

12. Given the foregoing, it is apparent that the Notice in this proceeding was faulty; it failed to identify the nature of the rules to be adopted, and did not adequately apprise radio amateurs of the obligations that would ultimately be placed on them by the *Report and Order*. There was an inadequate opportunity to comment on the proposals finally adopted. The League, in its comments, noted the inadequacy of the Notice. Its concerns were never addressed in the *Report and Order*. Accordingly, the League suggests that these rules governing amateur stations should be vacated and a further notice issued to permit comment on the rule text; in particular, the 50-watt threshold for amateur station environmental assessments.

III. The 50-Watt Threshold for Environmental Evaluations At Amateur Stations Is Arbitrary

13. The *Report and Order*, at Paragraphs 160 and 162, indicates that the Commission

imposed the 50-watt TPO threshold[6] for triggering an environmental assessment without scientific basis therefor. The *Report and Order*, at paragraph 157, cites the contentions of an entity identified as the "ARRL Bio-Effects Committee"[7] to the effect that certain ***mobile*** installations operating at 100 watts at VHF may produce higher fields inside the vehicle than the ANSI-IEEE standard would allow. Then, without any other analysis (other than an expressed desire to make a complex determination of possible excessive exposure as "simple" as possible; see Paragraph 162), the 50-watt TPO threshold for environmental assessments by radio amateurs was established by the Commission. There is no consideration of antenna height or other variables, such as antenna gain, emission mode, or duty cycle included in the threshold computation. In addition, mobile installations using push-to-talk, regardless of power, are exempt from the environmental evaluation requirement.

14. Based on the criteria for other services covered by these regulations, the 50-watt threshold for environmental evaluations is unfairly low. For example, the Multipoint Distribution Service, Paging and Radiotelephone Service, Cellular Radiotelephone Service, Personal Communications Service, Experimental, Auxiliary and Special Broadcast Services under Part 74, and the Private Land Mobile Services and SMR Services require evaluation only if a non-rooftop antenna is less than ten meters high AGL *and* the total power is greater than 1000 watts

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[6] See, 47 C.F.R. §97.13(c), as amended by the *Report and Order*.

[7] The Commission's identification of this group of commenters is a misnomer. The individuals who filed comments did so expressly in their individual capacities, and not as representatives of the American Radio Relay League, or of any committee of the American Radio Relay League, Incorporated. While perhaps it was imprudent of the commenters to identify their group as being members of the ARRL Bioeffects Committee, the text of their comments made it clear that they were filing as individuals. The *Report and Order* is misleading in that it fails to disassociate the comments of that group from the American Radio Relay League.

ERP. See, Table 1, §1.1307. The *Report and Order* never enunciates the reason for treating the Amateur Service so much more restrictively than other services with far higher duty cycles. The arbitrariness of the restriction is especially apparent in view of the conclusions of the Commission in 1987, *Second Report and Order*, Docket 79-144, 2 FCC Rcd. 2064 (1987); *modified by erratum*, 2 FCC Rcd. 2526 (1987),[8] and largely reiterated in the *Report and Order*,[9] to the effect that amateur station configurations only rarely exceed the MPE limits.

15. The fixed threshold limit of 50 watts does not consider how the MPE varies with frequency in the ANSI standard, the NCRP standard, and the new regulations. For example, at 2.0 MHz (the upper edge of the amateur 160-meter allocation in ITU Regions 2 and 3), a maximum field of 45 mW/cm^2 is permitted, decreasing on a linear basis to 0.2 mW/cm^2 at 30 MHz. The MPE remains flat at 0.2 mW/cm^2 from 30-300 MHz. It then increases on a linear basis to 1.0 mW/cm^2 at 1500 MHz, and remains flat to 100,000 MHz. What the Commission appears to have done is to take the *worst case* (30-300 MHz), select a power level for that worst

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[8] There, the Commission held as follows:

> Regarding amateur radio facilities, no specific evidence has been submitted that these facilities present a significant risk to the public that would warrant routine environmental evaluation. While hypothetically, RF radiation limits could be exceeded in a few instances, such situations apparently seldom occur in actual operation. Furthermore, because amateur stations are not individually licensed by frequency, modulation, power output, or location, it would not be administratively feasible to evaluate amateur applications for this environmental factor. Consequently, we find that amateur radio operators, at the time of licensing, should not be required to routinely submit environmental information concerning exposure to RF radiation. Nevertheless, as an added precaution, we agree with [the League] that operator education would help to assure compliance with ANSI guidelines. In that connection, RF radiation safety questions are being incorporated into amateur examination study guides.

2 FCC Rcd at 2066.

[9] See paragraphs 152, 155, 157 and 162 of the *Report and Order*.

case, and then apply that power level across the board. If the power threshold were accurately scaled by frequency to match the MPE limits in the regulations on a basis equivalent to 50 watts, the following power levels could be permitted without environmental evaluation:

Frequency	MPE (mW/cm^2)	Scaled Power
2.0 MHz	45.00	> 1500.0 W
4.0 MHz	11.25	> 1500.0 W
7.3 MHz	3.38	845.0 W
10.15 MHz	1.75	437.5 W
14.35 MHz	0.88	220.0 W
18.168 MHz	0.55	137.5 W
21.45 MHz	0.39	97.5 W
24.990 MHz	0.29	72.5 W
29.7 MHz	0.20	50.0 W
54.0 MHz	0.20	50.0 W
148.0 MHz	0.20	50.0 W
225.0 MHz	0.20	50.0 W
420.0 MHz	0.28	70.0 W
902.0 MHz	0.60	150.0 W
1240.0 MHz	0.83	207.5 W

16. A higher limit than the 50 watt threshold is justified by the actual test data contained in the Commission's Report, *FCC/OET ASD-9601, "Measurements of Environmental Electromagnetic Fields at Amateur Radio Stations"*. Though this study was limited to nine amateur stations, the *only* fixed station that was found to exceed the ANSI limits was a 120-watt station operating on 7.0 MHz with an antenna located only 4 meters off the ground. It showed RF levels at 176 percent of the MPE. However, once this was adjusted for duty cycle for mode (approximately 40 percent for A1 emission and approximately 15 percent for A3J emission) and for operating on-off times, this station would have been below MPE levels.

17. The threshold of 50 watts without adjustment for frequency is arbitrary. Because exceeding the threshold (which will occur for the majority of amateur HF stations, as

commercial HF transceivers typically operate at 100 watts TPO) triggers significant regulatory obligations of licensees, the artificially low threshold constitutes regulatory overkill. The League requests that this threshold be modified to incorporate the power levels contained in the foregoing table, or else increase the threshold to at least 150 watts TPO, if all parts of the antenna are located at least 10 meters from any area of uncontrolled exposure.

IV. The Commission Must Preempt Non-Federal RF Exposure Regulations That Are More Restrictive Than The Adopted Standard For All Radio Services

18. The *Report and Order*, at Paragraph 156, notes the League's urgent argument for a more comprehensive preemption statement relative to amateur radio antennas, in view of the establishment of comprehensive Federal regulation of RF exposure for all radio services. If this is not done, the combination of the new RF exposure regulations and the Commission's allowance of municipal or private land use regulation of antennas based on RF exposure concerns is tantamount to a license revocation: it will in many cases preclude the operation of amateur stations subject to both Federal and non-Federal restrictions. This is especially true with respect to deed restrictions, which currently, in many, if not most, metropolitan and suburban areas throughout the United States, preclude all outdoor antennas. If amateurs cannot operate using outdoor antennas due to deed restrictions, and they cannot use indoor antennas (which are largely ineffective anyway) due to concern about exceeding MPE levels, all amateur communications are precluded. Though this point was noted by the Commission in the *Report and Order* as having been made by the League, it was not addressed by the Commission in its decision.

19. Furthermore, the comprehensive nature of the Federal regulation of RF exposure makes it incumbent on the Commission to preempt all non-Federal regulation of communications

facilities using standards that are (1) more restrictive than the Commission's adopted standard relative to licensed communications facilities, and (2) not based on scientific evidence of specific health hazards at lower MPE levels than those allowed by the Commission. The *Report and Order*, at Paragraph 167, suggests that instances of State and local regulation of RF exposure are motivated by "bona fide concerns" for health and safety. Because of that, the Commission stated its reluctance to preempt such regulations other than with respect to "personal wireless services". The Commission was willing to preempt these same state and local regulations as applied to personal wireless services (notwithstanding the fact that the State and local regulations are apparently based on "bona fide concerns" about health and safety), because Congress so instructed. There is no indication, however, in the Telecommunications Act or otherwise, that Congress intended that the Commission selectively preempt state and local RF exposure regulations based solely on the category of radio service that is adversely affected. Nor is there any logic at all in preempting the application of state and local RF exposure regulations to commercial mobile services, but permitting the application of those non-Federal regulations to the Amateur Service, private mobile services, or the like. The Commission held, at Paragraph 168 of the *Report and Order*, that it has adopted regulations that "represent the best scientific thought and are sufficient to protect the public health." It stated its belief that States and municipalities will recognize this and agree that no further regulations are called for. However, it indicated that it intended to adjudicate each complaint about State or local regulations from licensees separately. Having decided to preempt relative to personal wireless services, however, the Commission has placed an arbitrary, burdensome obligation on other, individual licensees, which have to bear the burden of going forward and justifying a preemption decision on an individual, case-by-case basis. The creation of such a burdensome, time-consuming process that

pits the municipalities against the licensees located in those municipalities, and which is applicable to only some licensees, is strikingly inappropriate; it accords differing regulatory treatment to personal wireless service licensees on the one hand, and licensees in other services who in exactly the same circumstances, without any basis for the distinction.

20. That a State or municipal RF exposure regulation may be based on "bona fide concerns" about health and safety has nothing to do with the appropriateness of Federal preemption of that same area. The question is whether the State or local regulation "stands as an obstacle to the accomplishment of and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Here, the FCC has the obligation to facilitate an effective communications infrastructure, and it has the obligation under NEPA to determine the environmental impact of Federal licensing actions. Having determined the appropriate standard to apply in regulating and licensing communications facilities, it cannot allow arbitrary State or local determinations, whether or not motivated by "bona fide concerns", to adversely affect the ability of licensees to install, maintain and operate licensed communications facilities. The Commission has already determined that state and local regulations that preclude amateur communications are in direct conflict with Federal objectives and must be preempted. *Amateur Radio Preemption*, 101 FCC 2d 952 (1985). It remains for the Commission, having determined the appropriate maximum permitted exposure levels for RF energy, and having adopted comprehensive regulations for all radio services which adequately protect health and safety of the public, to preempt non-Federal regulation of the same subject matter to the extent that such are more restrictive than the Federal standard, absent compelling scientific evidence in the possession of the State or local authority at the time of adoption of the regulations tending to prove that more restrictive standards than the prevailing Federal standard

are necessary for the protection of health and safety. The *Report and Order* failed to adequately analyze the preemption issue, and failed to address the arguments made in favor of preemption in the comments. As such, the Commission must reevaluate the issue.

V. The *Report and Order* Created Unreasonable Burdens For Volunteer Examiner Coordinators, Volunteer Examiners, and Publishers of Educational Materials for Radio Amateurs

21. The *Report and Order*, without any advance notice, substantially changed the Amateur Radio examination regulations, and made the changes effective immediately. It was, and remains, impossible for the thousands of volunteers providing service to the Commission to comply with those regulations, absent a transition period for implementation of them. This subject was comprehensively addressed in an "Emergency Motion for Extension of Effective Date of Rules" filed August 12, 1996, and which remains pending to date. It is unnecessary to reiterate the arguments made in that motion, a copy of which is attached hereto as **Exhibit A** and incorporated herein by reference. It remains for the Commission to extend the effective date of the amateur examination regulations so as to provide for a reasonable transition period, to avoid a serious adverse burden on those amateurs and amateur groups providing extensive volunteer services in examination preparation and administration.

22. Another aspect of this problem, however, is that the overhaul of amateur examination requirements, which forced a change in the examination question pools and the examinations themselves, which changes were made without any advance notice and which were made effective immediately upon release, has invalidated a number of the publications that are marketed to radio amateurs preparing for initial or license upgrade examinations. The adverse impact of this action on publishers such as the League would have been noted had the Commission given any advance notice of its intent prior to the *Report and Order*. As it is, the

Commission failed to address the impact on radio amateurs, amateur groups, or publishers of amateur radio examination preparation materials in its Regulatory Flexibility Act analysis. There was no mention in that analysis of amateur radio at all, and no indication as to what steps could have been taken to minimize the adverse cost and other impact on amateur groups and publishing entities. The Regulatory Flexibility Act analysis was therefore flawed and should be reevaluated in light of the foregoing.

VI. Conclusions

23. The Commission has inadequately addressed the concerns and interests of the Amateur Service in this proceeding. The League noted, in comments filed more than two years ago, the procedural flaws in the Notice in this proceeding, including the fact that the Notice did not propose any rules, or rules changes, at all. These procedural improprieties were not even addressed in the *Report and Order*. Instead, the *Report and Order* created rules not previously proposed that imposed arbitrary, yet substantive obligations on radio amateurs. The 50-watt TPO threshold requirement for conducting environmental evaluations by Amateur Radio licensees is both arbitrarily established and artificially low; it creates concerns on the part of State and local land use and other regulatory authorities; and it differentiates between amateur stations and other Commission licensees which are treated far less restrictively. Neither did the Commission adequately address the propriety of preemption of State and local RF exposure regulations (or land use decisions based on RF exposure concerns) which arbitrarily restrict the ability of Commission licensed communications facilities to provide service. Finally, because it failed to assess the adverse impact of its rule changes regarding amateur radio examinations on small business entities involved in amateur radio examination preparation, administration, and publishing, the Regulatory Flexibility Act analysis in the *Report and Order* is flawed.

Therefore, the foregoing considered, the American Radio Relay League, Incorporated respectfully requests that the Commission reconsider and modify its *Report and Order* in this proceeding in the respects noted above.

Respectfully submitted,

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September 6, 1996

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Guidelines for Evaluating the Effects of Radiofrequency Radiation	)	ET Docket No. 93-62

To: The Commission

EMERGENCY MOTION FOR EXTENSION OF EFFECTIVE DATE OF RULES

The American Radio Relay League, Incorporated (the League), the national association of amateur radio operators in the United States, by counsel, hereby respectfully requests that the Commission extend the effective date of one of the rule sections amended by the *Report and Order*, FCC 96-326, (61 Red. Reg. 41006) released August 1, 1996, so as to provide a reasonable transition period for implementation of new examinations, and examination question pools for amateur radio licenses. Because of the hardship already created by the timetables established in the *Report and Order*, the League requests that this motion be treated as an emergency request, if necessary, for a partial temporary stay of the effective date of one rule section, 47 C.F.R. 97.503(b). As good cause for the emergency relief requested, the League states as follows:

1. The League operates the largest Volunteer Examiner Coordinator (VEC) for amateur radio examinations, and is responsible for the preparation and administration of more than 60 percent of all examinations administered for Amateur operator licenses. In the past twelve months, the ARRL-VEC administered

examination elements to 54,409 individuals, at 6,409 examination sessions. The Volunteer Examination (VE) program is eminently successful, and serves as a model of volunteerism and successful privatization for other radio services administered by the Commission. The VE program operates on the basis of preparation of examinations from published, common question pools. The pools are privately maintained by a committee consisting of representatives from several VECs. There are now sixteen VECs providing examination coordination services for amateur radio licensing. The VECs develop the question pools, from which the examinations are derived, pursuant to FCC Part 97 rules, but the maintenance of the question pools is only minimally overseen by the Commission's staff.

2. Revision of these question pools is done periodically, according to an established and published schedule, by the committee of representatives of VECs. This is done so that the examinations can be updated periodically, and so that Volunteer Examiners (VEs) are aware of the revised pools and implement them at the proper time. Those VECs which prepare examinations for the VEs to administer do so in quantity, at significant expense. Furthermore, publishers who prepare examination preparation material base their publications on the information in the question pools. Changes in the pools change the publications. The published, strictly adhered-to schedules for examination question pool revisions create a necessary predictability in the VE program.

3. The instant *Report and Order* is made effective as of the date of publication thereof in the Federal Register (See paragraph

170 thereof). The date of publication of the *Report and Order* was August 7, 1996 (at 61 Red. Reg. 41006, *et seq.*) making that the effective date of each of the new or amended rules. Among the amended rules in Appendix C to the *Report and Order* is Section 97.503(b), which governs examination administration in the Amateur Service. That subsection, as amended, requires that, for Examination Element 2, 35 questions be administered to each candidate. For Examination Element 3(A), 30 questions must be administered, and for Examination Element 3(B), 30 questions must be administered, per examination. Prior to the *Report and Order*, the rule required 30, 25 and 25 questions respectively, for those examination elements. The rule change, therefore, requires that on and after August 7, 1996, five additional questions must be administered to each candidate for each of the three examination elements.

4. Related to this is Section 97.507(b) of the rules, which requires that each examination administered to an amateur candidate must utilize questions taken from the applicable question pool. Also, Section 97.523 of the rules requires that each question pool contain at least ten times the number of questions for a single examination element. Therefore, based on the new rules, there must be, as of August 7, 1996, 350 questions in the Element 2 question pool, and 300 questions in each of the Element 3(A) and 3(B) question pools. The revised Section 97.503(c)(10) in Appendix C requires that at least five questions in each of those three